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INTRODUCTION TO THE CIVIL LAW OF OBLIGATIONS

Prof. Daniel Jutras
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OBJECTIVE OF THE COURSE

The emphasis of the course will be on presenting the methodology and culture of a North American legal system which is both civil law and codified. Topics should be approached with a view to identifying the peculiarities of civil law methodology in resolving problems that confront systems of private law in the domain of obligations.

The most striking aspect of civil law is the continued popularity of a special form of doctrinal approach to law, often disparagingly known in common law systems as conceptualism. The course, and the discussion of topics will emphasize the importance of broad principles in the Quebec legal culture, and how the legal system can achieve a semblance of certainty despite the lack of specificity of most of its rules. The civil law conception of a legal rule will be highlighted. The relationship between principle and the solution of a given case is particularly instructive : the tension between the generality of the rule that ensures its continued dominance, and the evolution and multiplicity of specific problems is a feature of any system of private law. The civil law's solution to this dilemma is the preservation of judicial discretion through a formulation of broad principles that do not yield immediate solutions and a refusal to adopt a strict rule of precedent (in this respect, one could argue that Quebec's private law system has achieved the least desirable mix of the two western cultures : it relies on conceptualism while enforcing precedent to a very large degree). Ideally, in the civil law, legal concepts are so broad that they become ideological shells that can be emptied and filled with specific normative variants almost at will, but this can occur

only over time and only as long as the new content fits with the prevalent intellectual orientation of the time and with the overall structure of the system. At its worst, reliance on broad rules can stifle the search for just solutions by confining the debate to a discussion of appropriate classification of issues (see the debate on option or the intensity of obligations, for example). Civil law systems are therefore easily open to the realist critique but have remained impervious to it, largely because the legal rule is not asked by conceptualists to perform the same prescriptive function as in the common law. Holmes' epigram "General principles do not decide concrete cases" is meaningless in the civil law tradition.

Perhaps one might explain the commitment to conceptualism as a way of protecting civil law (and Quebec culture) from corrupting outside influences. Or through the very idea of codification, the nature of which calls, to a certain extent, for a commitment to the idea that one can generate just and predictable solutions to conflicts through the application of general principles to particular situations.

The search for the optimal level of generality of codal rules is present in discussions of most of the topics in obligations. The course will emphasize the way in which civil law responds to the pressure of conflicting values (such as fairness/freedom in the contractual setting, public/private conceptions of delictual responsibility, individualism / social solidarity) by formulating broad statements about the foundation of obligations at a level of generality that precludes any denial of their ideological correctness and logical consistency (eg the concept of fault). It will also illustrate how such a methodology

necessarily consigns "trouble" cases to the legislature for statutory solutions.

